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**APPEALS BOARD  
UTAH LABOR COMMISSION**

**DEBRA HENDRICKSON,**

**Petitioner,**

**vs.**

**SMITH'S FOOD AND DRUG CENTER,**

**Respondent.**

**ORDER ON MOTION  
FOR REVIEW**

**Case No. 05-0463**

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Debra Hendrickson requests review of Administrative Law Judge Sessions' dismissal of Ms. Hendrickson's claim for benefits under the Utah Occupational Disease Act ("the Act"; Title 34A, Chapter 3, Utah Code Annotated).

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated §63-46b-12 and §34A-2-801(3).

**BACKGROUND AND ISSUE PRESENTED**

On May 16, 2005, Ms. Hendrickson filed an application for hearing with the Labor Commission's Adjudication Division. This application set out Ms. Hendrickson's claim for benefits against Smith's Food & Drug Centers, Inc. ("Smith's" hereafter) for an alleged occupational disease arising on March 22, 2005, and described as "anxiety, panic disorder and panic attacks" due to "ongoing mistreatment, abuse—not good faith employer personnel actions."<sup>1</sup> Ms. Hendrickson also filed an employment discrimination complaint against Smith's based on this same alleged misconduct. Smith's moved for dismissal of Ms. Hendrickson's claim on the following grounds:

- Ms. Hendrickson's current claim is barred by the parties' settlement agreement in an earlier claim; and
- Ms. Hendrickson's current claim is barred by §34A-3-106(5) of the Utah Occupational Disease Act, which precludes occupational disease claims based on employer conduct that is "otherwise actionable."

On July 6, 2005, Judge Sessions granted Smith's motion for dismissal as to both of its arguments and dismissed Ms. Hendrickson's claim with prejudice. In requesting review of Judge Sessions' decision, Ms. Hendrickson contends that her current claim is not barred by the earlier settlement agreement and that, even if her current claim is subject to dismissal under §34A-3-106(5), the dismissal should be "without prejudice."

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<sup>1</sup> The Appeals Board notes that Ms. Hendrickson also filed other occupational disease claims relating to over-use of her right foot and shoulder. Those claims have been adjudicated in another adjudicative proceeding, designated as case number 05-0991 and are not addressed in this decision.

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**DISCUSSION**

Dismissal based on prior settlement. Although Smith's has framed its motion to dismiss Ms. Hendrickson's claim as a motion for summary judgment pursuant to §63-46b-1(4)(b) of the Utah Administrative Procedures Act ("UAPA") and Rule 56 of the Utah Rules of Civil Procedure, Rule 56(c) allows summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Smith's did not submit any such supporting material with its motion, but instead relied entirely on Ms. Hendrickson's application for hearing, with attachment, and Smith's answer. The Appeals Board therefore concludes that Smith's motion must be evaluated as a motion to dismiss under Rule 12(b), U.R.C.P.<sup>2</sup> and that the allegations of Ms. Hendrickson's application must be accepted as true. Smith's is entitled to dismissal of Ms. Hendrickson's claim only if "it clearly appears that the plaintiff can prove no set of facts in support of [her] claim." *Coleman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990).

Smith's argues that Ms. Hendrickson's current claim, alleging that Smith's conduct caused her to suffer "anxiety, panic disorder, panic attacks" with an onset date of March 22, 2005, is barred by the parties' agreement of September 23, 2003. According to Smith's, Ms. Hendrickson waived her right to pursue her current claim when she settled her previous claim. However, it is possible that Ms. Hendrickson will submit evidence to establish that her current claim is a new mental stress injury caused by Smith's post-settlement conduct. If so, this new mental stress injury would not be subject to the prior settlement agreement.

Dismissal based on §34A-3-106(5). Section 34A-3-106(5) provides as follows: "Alleged discrimination, harassment, or unfair labor practices otherwise actionable at law may not form the basis of compensable mental stress claims under this chapter." As already noted, Ms. Hendrickson is seeking occupational disease benefits for a mental stress injury allegedly caused by Smith's improper conduct toward her. But Ms. Hendrickson has also filed an employment discrimination complaint against Smith's based on this same alleged improper conduct. Judge Sessions therefore applied the provisions of §34A-3-106(5) and dismissed Ms. Hendrickson's occupational disease claim "with prejudice."

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<sup>2</sup> The Utah Supreme Court addressed this issue in *Wilkinson v. Union Pacific R. Co.*, 975 P.2d 464, 465 (Utah 1998)(citations omitted):

In this case, Union Pacific has not supported its motion for summary judgment--it has offered no affidavits showing that the facts are undisputed facts. Because Union Pacific has offered no affidavits disputing Wilkinson's allegations, it has not met its burden of showing that there are no material issues of fact. Consequently, Wilkinson may rely on the allegations in her pleadings.

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In challenging Judge Sessions' action, Ms. Hendrickson argues that her occupational disease claim should have been dismissed "without prejudice." The Appeals Board has previously addressed this same issue in *Tina McCurdy v. J. T. Steel, et al*, Labor Commission Case No. 02-0457, issued January 16, 2003. There, the Appeals Board concluded that occupational disease claims dismissed under §34A-3-106(5) should be dismissed "without prejudice" so that the claim can be refiled under appropriate circumstances. The Appeals Board hereby reaffirms its ruling in *McCurdy* and concludes that the ruling applies with equal force in this case.

**ORDER**

The Appeals Board hereby sets aside Judge Sessions' determination that Ms. Hendrickson's current occupational disease claim for mental stress is barred by the parties' previous settlement of September 23, 2003.

The Appeals Board hereby modifies Judge Sessions' dismissal of Ms. Hendrickson's occupational disease/mental stress claim pursuant to §34A-3-106(5) from a dismissal with prejudice to a dismissal without prejudice. It is so ordered.

Dated this 31<sup>st</sup> day of May, 2007.

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Colleen S. Colton, Chair

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Patricia S. Drawe

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Joseph E. Hatch